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August 29, 2014

Via Email

Daniel Reich
U.S. EPA Region 9
75 Hawthorne Street
ORC-2
San Francisco, California 94105-3901

Re: U.S. EPA Region IX Clean Air Act Information Request

Dear Mr. Reich:

I write to transmit Walmart's responses to Requests 12 and 13 of the information request it received on June 21, 2014 from the U.S. Environmental Protection Agency ("EPA"), Region IX, under Section 114 of the Clean Air Act, 42 U.S.C. § 7414 ("Section 114 Information Request"). The Region's Section 114 Information Request pertains to its effort to determine Walmart's "compliance status" with the California Air Resources Board's ("CARB") Truck and Bus rule. *See* Section 114 Information Request at 1. Pursuant to your email dated July 17, 2014, Region IX granted Walmart an extension until August 29, 2014, to respond to Requests 12 and 13 of the Section 114 Information Request.

Walmart interposes the following general objections and qualifications to the Section 114 Information Request.

First, Walmart objects to the Section 114 Information Request (including its instructions and definitions) to the extent it is vague, ambiguous, unduly burdensome, duplicative, premature, oppressive, and/or overbroad, including, without limitation, as to subject matter and/or time period, where compliance with specific requests would be unreasonably difficult as well as prohibitively expensive or time-consuming, and where the request is beyond the scope of EPA Region IX's authority to request information pursuant to Section 114 of the Clean Air Act, 42 U.S.C. § 7414, as further described below.

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Second, Walmart objects to the Section 114 Information Request (including the instructions and definitions) to the extent it seeks information or documents not within Walmart's possession, custody, or control. All responses are made on behalf of Walmart, and are limited to information and documents within Walmart's possession, custody, or control.

Third, Walmart's response is made without waiving, in any manner, Walmart's right to object to the use of any information or documents provided in response to these requests at any trial, evidentiary hearing, or other proceeding on grounds of privilege, relevance, materiality, authenticity, hearsay, or any other ground permitted by any applicable law or rule.

Fourth, Walmart objects to the Section 114 Information Request to the extent that EPA interprets 13 CCR § 2025(x)(2) of the Truck and Bus rule to apply to Walmart when it contracts with third party motor carriers to ship freight within California. On August 14, 2014, you, Debbie Lowe Liang of Region IX's Enforcement Division, and I spoke regarding the interplay between Requests 1-11 and Requests 12-13 of the Section 114 Information Request. During that call, EPA Region IX explained to me that it expected to receive information regarding any third party motor carriers that Walmart contracts with to move freight in California in response to Requests 12 and 13. EPA presented an interpretation in which Walmart would be subject to the verification requirements of Section 2025(x)(2) in any instance in which it moves freight, regardless of whether it is the motor carrier transporting the freight.

Section 2025(x)(2) establishes compliance requirements for any "motor carrier, California broker, or any California resident who operates or directs the operation of any vehicle subject to [the Truck and Bus] regulation." *See* 13 CCR § 2025(x)(2). The terms "motor carrier" and "California broker" are defined in Section 2025(d). As a "motor carrier," Walmart is responsible for ensuring compliance of its private fleet. However, because Walmart is not one of the other enumerated entities identified in Section 2025(x)(2), Walmart is not otherwise subject to the requirements of Section 2025(x)(2) for non-Walmart trucks. Walmart and EPA have agreed to participate on a teleconference at which time both Walmart and EPA can further discuss each party's respective understanding of the rule. That teleconference is currently scheduled for September 4, 2014. Walmart reserves the right to supplement this response in light of any future conversations it may have with EPA pertaining to this issue.

Additionally, during our call on August 14, 2014, I explained that there was language in the rulemaking docket that supported Walmart's understanding of Section 2025(x)(2). You invited Walmart to provide EPA Region IX with that information, which you indicated the Region would consider in assessing the applicability of Section 2025(x)(2). With this letter, Walmart is providing EPA Region IX with information both from CARB's Truck and Bus rule docket, as well as other CARB rules, to facilitate our future discussions regarding an interpretation of the applicability of Section 2025(x)(2).

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As way of background, Walmart Transportation is not subject to Section 2025(x)(2) because it is not a motor carrier, California broker, or California resident that directs the operation of any hired or dispatched vehicles (other than its own private fleet). Importantly, to be a “motor carrier,” one must own or lease the vehicles and be the entity that operates or directs their operation. *See* Cal. Veh. Code § 408. Walmart Transportation contracts with third party motor carriers to move freight in California. However, in this circumstance, Walmart Transportation is the shipper or consignee (aka receiver), and the hired third party is the motor carrier who owns or leases the trucks. Indeed, it is the third party motor carrier -- not Walmart -- that directs the operation of these drivers and vehicles.

CARB expressly did not include “shippers” or “consignees” as an entity subject to Section 2025(x)(2). As CARB stated in its response to comments for the Truck and Bus rule, “[s]hippers and receivers are often not involved in the operation or direction of the trucks that move goods.” *See* California Air Resources Board, Final Statement of Reasons for Rulemaking Revised (“Final Statement of Reasons”) at 492 of PDF (posted on November 2, 2009) (Comment 26 and Agency Response). Thus, according to CARB, “[t]he regulation only affects fleet owners and those that operate to direct the operation of affected vehicles.” *Id.*

Had CARB intended to subject shippers to the requirements of Section 2025(x)(2), or otherwise to the requirements of the Truck and Bus rule, it would have expressly identified shippers in the rule. Indeed, in other CARB rules, such as the Tractor-Trailer Greenhouse Gas rule codified at 17 CCR §§ 95300-95312, as well as the Transport Refrigeration Unit rule codified at 13 CCR § 2477, CARB expressly included “shippers” among the entities subject to those rules. *See, e.g.*, 17 CCR § 95301 (“this subarticle applies to owners and drivers of the following equipment when driven on a highway within California, as well as motor carriers, California-based brokers, and **California-based shippers that use, or cause to be used, the following equipment on a highway within California.**”) (emphasis added); 13 CCR § 2477.2 (“California-based shippers: Section 2477.10 applies to California-based shippers (as defined in Section 2477.4) that arrange, tender contracts for, or dispatch the transport of perishable goods to any location in California in TRU-equipped or TRU gen set-equipped trucks, trailers, shipping containers, or railcars.)

Indeed, CARB amended the Transport Refrigeration Unit rule in 2011 to include shippers, among others, as a regulated entity under the rule. Thus, had CARB intended to include shippers among the category of entities subject to the Truck and Bus rule, it would have done so as it has done in at least two other rulemakings affecting diesel-fueled trucks, the same vehicles subject both to the Truck and Bus rule and EPA’s Section 114 Information Request.

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Walmart's view regarding the non-applicability of this rule to its shipping transactions is further confirmed by other language in docket to the Truck and Bus rule. For instance, in responding to a comment from the Central Coast Agriculture Association ("CCAA"), CARB stated that "[t]he requirement does not apply to someone hiring the services of [sic] trucking firm, but only applies to the entity that directs the operation of the vehicles." Final Statement of Reasons at 488 of PDF (Comment 15 and Agency Response). When Walmart Transportation enters into a contract with a third party motor carrier to move freight in California, Walmart Transportation is "hiring the services of a trucking firm." Thus, based on CARB's understanding of its own rule, as articulated in its response to the CCAA comment, the regulation does not apply to Walmart Transportation when it is hiring the services of a third party motor carrier (i.e., a trucking firm).

Additionally, there are instances in which CARB referred to the compliance verification requirement of Section 2025(x)(2) as pertaining to the "drivers" that are hired or dispatched. CARB suggested that motor carriers, California-based brokers, and California residents could "retain records documenting that all of the drivers they hire or dispatch are in compliance with the proposed regulation." *See* Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Proposed Regulation for In-Use On-Road Diesel Vehicles ("Initial Statement of Reasons") (October 2008) at 49 of PDF. *See also* Technical Support Document: Proposed Regulation for In-Use On-Road Diesel Vehicles ("Technical Support Document") (October 2008) at 154 of PDF ("retain records documenting that all of the drivers they hire or dispatch are in compliance with the proposed regulation."); *id.* at 275 of PDF ("retain records documenting that the drivers they hire or dispatch are in compliance with the proposed regulation"). As the shipper, Walmart Transportation does not hire a particular driver and is not in a position to verify the compliance of the selected drivers prior to being dispatched. Those functions are within the domain of the third party motor carrier.

Finally, in CARB's stated view, the entity that is subject to the compliance verification requirements of Section 2025(x)(2) is in a "unique position" to verify compliance because they "direct the operation of their drivers." *See* Initial Statement of Reasons at 49 of PDF; Technical Support Document at 275 of PDF. Indeed, motor carriers are subject to safety-related compliance verification requirements pertaining to their drivers pursuant to regulations promulgated by the Federal Motor Carrier Safety Administration. *See e.g.*, 49 C.F.R. parts 40, 390 to 396.

Accordingly, CARB did not view the Truck and Bus rule's verification requirement to be unlike other verification requirements already applicable to motor carriers. *See* Initial Statement of Reasons at 49 of PDF ("Such a requirement is already in place for other aspects of motor vehicle compliance, such as requiring proof of vehicle insurance, proper drivers licensing, and proof of compliance with various drug testing, vehicle safety, and worker compensation

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requirements.”); Technical Support Document at 275 of PDF (same). Again, in its capacity as the shipper, Walmart Transportation has no federal or state obligation to comply with motor carrier safety standards for the drivers of the third party motor carriers. CARB understood that it was adding a verification requirement to a number of others related to drivers because motor carriers already have similar requirements under other motor carrier standards. CARB was not adding a novel regime to shippers, a group that has no access to this type of vehicle-specific information for the third parties they hire.

Accordingly, notwithstanding the foregoing, and without waiving any of the foregoing qualifications and objections, Walmart submits the following response to Requests 12 and 13. Walmart reserves the right to supplement and revise this response in the future.

Wal-Mart Transportation, LLC’s Response to Request 12:

Wal-Mart Transportation, LLC (“Walmart Transportation”), does not have any information that is responsive to U.S. EPA Region IX’s Information Request 12. Walmart Transportation is a motor carrier authorized by the Department of Transportation, and directs the operation of a private fleet of trucks that Walmart Transportation owns. As a “motor carrier,” Walmart is responsible for ensuring compliance of its private fleet with CARB’s Truck and Bus rule. Information regarding Walmart Transportation’s fleet was requested by EPA Region IX in Requests 1-11, and will be submitted by September 19, 2014, per prior agreement. However, because Walmart Transportation is not one of the enumerated entities identified in Section 2025(x)(2) for any other vehicle as specified in Request 12, Walmart Transportation is not otherwise subject to the requirements of Section 2025(x)(2) for non-Walmart Transportation trucks.

Wal-Mart Transportation, LLC’s Response to Request 13:

Because Walmart Transportation does not have any information responsive to Request 12 for the reasons stated above, Walmart Transportation does not have any information responsive to Request 13.

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Please contact me if you have any questions regarding this response to Requests 12 and 13 to EPA Region IX's Section 114 Information Request. We look forward to speaking with you on September 4, 2014.

Sincerely,

A handwritten signature in black ink, appearing to read "Ilana Saltz", with a stylized flourish at the end.

Ilana Saltzbart

cc: Emily Reynolds, Walmart
Elizabeth O'Sullivan, Walmart
Mike Noble, Walmart